COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003342-98**

Robert V. Ward	Employee
Frito Lay Inc.	Employer
CNA Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Fabricant)

APPEARANCES
Gerald A. Feld, Esq., for the employee
Paul M. Moretti, Esq., for the employee on brief
Michael Ready, Esq., for the insurer

CARROLL, J. This is the second appeal by the insurer of an administrative judge's award of § 34A benefits. We again recommit the matter. Recommittal on the insurer's first appeal came about because the decision issued by the administrative judge was "identical, word for word including spelling . . . errors, to the [employee's] draft decision, [and did] not evidence any personal analysis by the administrative judge." Ward v. Frito-Lay Inc., (Bd. No. 003342-98, Memo of Recommittal – Feb. 20, 2003) quoting from Lavoie v. Westfield Pub. School Sys., 7 Mass. Workers' Comp. Rep. 77, 78 (1993).

On remand, the same judge again awarded § 34A benefits and the insurer again appealed. Confusion, inconsistency and various errors in the decision after remand necessitate another recommittal of this case. We mention some of the problems identified by the parties. The judge allowed additional medical evidence for the 'gap' and then defined the 'gap' period differently at various points in his decision (compare Dec. 3, see also Tr. 105 – 'gap' defined as June 5, 2001 to November 13, 2001, with Dec. 11 - 'gap' defined as February 14, 2001 to November 12, 2001); made mention of having allowed additional medical evidence for the 'gap,' (Dec. 3), but failed to mention in his decision having also opened the medical evidence on the issue of 'causation', (See

Tr. 101-106); and then seemingly used 'gap' medicals for the period beyond the gap period and into the period of disability opined to by the impartial physician. "Gap" medicals, when allowed for the reason of providing evidence in a retrospective pre-examination period, as here, may not then be used for other medical issues in the case, such as present disability. Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96 (2004). Moreover, where there is no recognition that the medical evidence was opened up on the issue of causation, the reviewing board cannot conclude that the judge had that in mind when he made his findings.

The decision after remand is so confusing as to render effective appellate review impossible, requiring recommittal. See Marticio v. Fishery Prods., Int'l, 11 Mass. Workers' Comp. Rep. 648, 649-650 (1997); Gatturna v. M.J Flaherty Co., 10 Mass Workers' Comp. Rep. 336, 338 (1996).

Because the administrative judge no longer serves the department, the case is transferred to the senior judge for reassignment and a hearing de novo.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **May 31, 2005**

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Bernard W. Fabricant
Administrative Law Judge